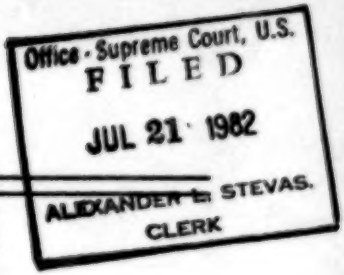
82-164

NO.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

VICTOR J. FELICE,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Whether a genuine question of material fact existed making it improper for the Court of Claims to grant a motion for summary judgment.

2. Whether the Court of Claims has the power to reinstate Petitioner and to award damages resulting from a failure to appoint him to a full-time magistrate's position where he can show an entitlement, waiver of soveriegn immunity, and no alternative remedies.

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

VICTOR J. FELICE,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Victor J. Felice petitions for a writ of certiorari to review the judgment and order entered in the United States Court of Claims on April 23, 1982.

OPINION BELOW

The order granting the respondent's motion for summary judgment is set forth in the Appendix at A-1 to A-8.

JURISDICTION

The judgment and order of the Court of Claims were entered on April 23, 1982. The Petition for Certiorari is being filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1?55(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Appendices contain the following:

The Fifth Amendment to the Constitution of the United States at C1.

Back Pay Act, 5 U.S.C. § 5596, at D1-D3.

Federal Magistrates Act, 28 U.S.C. §§ 631, 633, 634, at E1-E9.

Tucker Act, 28 U.S.C. § 1491, at F1-F2.

Federal Rules of Civil Procedure, Rule 56(c), at G1-G2.

The Standards and Procedures of the Judicial Conference of the United States for the Appointment of United States Magistrates (March, 1978) at H1-H13.

Reports of the Proceedings of the Judicial Conference of the United States Held at Washington, D.C., March 9-10, 1978 and September 21-22, 1978; Selection of Magistrates at H14-H15.

The Regulations of the Judicial Conference of the United States for the Appointment of United States Magistrates (March, 1980) at I1-I22.

STATEMENT OF CASE

Petitioner Victor J. Felice was appointed part-time United States Commissioner for the Eastern District of Washington by Judge Samuel Driver in 1956. He was reappointed by Judge Charles Powell to four year terms in 1960, 1964

and 1968. Pursuant to the Federal Magistrates Act, 28 U.S.C. § 631, Judge Powell appointed Petitioner to a four-year term as part-time United States Magistrate beginning March 31, 1969. (Petition, B2)

On several occasions, Petitioner advised Judge Powell that the demands of the office were too time consuming for the compensation provided. Judge Powell urged Petitioner to remain in office, promising him that more equitable compensation would be provided. (Affidavit of Felice, J3) Judge Powell expressed his gratitude for Petitioner's continued service as magistrate despite the increased demands on Petitioner's time at the expense of his private law practice. (Affidavit of Felice, J3-J4; Ex. 2, J19) The position was likely to become a full-time one, and Judge Powell indicated that Petitioner was the obvious choice to fill

it. With these assurances, Petitioner curtailed his law practice and stayed in office. (Affidavit of Felice, J4)

Judge Marshall Neill also recognized that the pay was inadequate for the time required by the office. In a letter to Petitioner dated April 23, 1974, Judge Neill asked Petitioner to bear with the government because the salary and benefits would improve. Neill recognized that Petitioner could not continue in office unless the salary was increased. (Affidavit of Felice, J4-J5; Ex. 3, J20-J21) In a letter dated June 7, 1974, Judge Neill asked Judge Richard Chambers of the Court of Appeals for the Ninth Circuit for an increased salary for Petitioner, mentioning Petitioner's hardship and praising him as an experienced, capable and valuable magistrate. (Affidavit of Felice, J5; Ex. 4, J22-J26)

Petitioner remained in the position relying on Neill's assurances. (Affidavit of Felice, J5-J6) At this time in 1974 it was increasingly apparent to Petitioner that the magistrate's position would become full-time some time in the future. (Affidavit of Felice, J6)

On January 25, 1975, Judge Neill and Judge William Goodwin reappointed Petitioner for a four-year term as part-time magistrate. The same year, Judge Neill requested that Petitioner discontinue his state criminal law practice which amounted to 30 percent of his total private practice. Petitioner agreed, despite the financial burden, because the intent of the Magistrates Act expressed in 28 U.S.C. § 633(a)(3) is to establish a system of full-time magistrates and because the increasing workload of the

magistrate's office, the gradual expansion of its duties, and the satisfaction of the federal judiciary with the system indicated that the part-time position probably would be converted to full-time. (Affidavit of Felice, J6-J7)

Petitioner continued to be led to believe he would be nominated. He advised Judge Neill in 1977 that he wished to be appointed. Judge Neill said nothing to indicate that the Petitioner would not be appointed. In fact, Judge Neill led Petitioner to believe that he would be appointed when the position was authorized. In May of 1977, Judge Neill asked Petitioner to attend a seminar specifically for full-time magistrates, which he did. (Affidavit of Felice, J7-J8; Ex. 5, J-27-J28; Ex. 6, J29; Ex. 7, J30)

The full-time position was finally authorized in 1978. Petitioner visited Neill with the express purpose of discussing the position and told him that he wanted to be nominated. Petitioner was aware that, as the present part-time magistrate, he was to be considered as if he were a full-time magistrate whose term had expired. (Affidavit of Felice, J8-J9) Judge Neill told him that a select committee of the local bar would have to approve his appointment. When Petitioner was reappointed by Judge Neill and Judge Jack Turner to the part-time position in 1979, his appointment was for four years or until a full-time magistrate was appointed. (Petition, B3) Petitioner interpreted this provision as an academic method of converting the part-time position to a full-time one, much like the procedure gone through when his office as

commissioner had been converted into his office as magistrate. (Affidavit of Felice, J12-J13) For several years, Petitioner had remained in office only because he had been led to believe he would be nominated and appointed to the full-time position. (Affidavit of Felice, J10)

But with no warning of any kind, Petitioner received a letter from Judge Neill on May 7, 1979, saying that Neill had appointed Smithmoore P. Myers to the full-time position. Judge Neill never announced the opening, never solicited applications, and never formed a nominating commission or select bar committee. (Petition, B4-B5) Petitioner responded with a letter expressing his shock, anger, disappointment, and frustration and stated that Judge Neill had led him to believe he would be appointed. He

pointed out that Judge Neill had ignored the Judicial Conference guidelines in failing to announce the opening and in nominating an individual unqualified because he would be 70 years old before his term expired. (Letter from Felice to Judge Neill, May 9, 1979, K1-K11)

Petitioner said his reputation had been ruined by a suggestion that he was replaced because of misfeasance or malfeasance. He did, however, remain available to serve as a full-time magistrate if Neill would reconsider. (Letter from Felice to Judge Neill, May 9, 1979, K11) Judge Neill nevertheless appointed Myers to succeed Petitioner. Petitioner's letter of May 9 was the only means he had to appeal from Judge Neill's decision and to mitigate and negate the innuendos and inferences of misconduct, incompetency or

neglect of duty generated by the disclosure of his removal. Petitioner was discarded without cause or a hearing and was left with no administrative remedies. (Affidavit of Nicholas P. Scarpelli, Jr., L1-L3) The letter was also an attempt to convince Judge Neill to change his mind. (Affidavit of Felice, p. J13-J14)

During the spring of 1979 when these events transpired, Judge Neill was severely ill. He had undergone major surgery in April of 1979, and was incapacitated to the point where he was unable to attend his office or court to perform his judicial functions. (Affidavit of Felice, J16-J17)

Further challenging the abolishment of his position, Petitioner filed suit in U.S. District Court for the Eastern District of Washington The suit was voluntarily dismissed on August 25, 1980.

(Petition, B1-B2) Petitioner then filed the present action in the U.S. Court of Claims, pursuant to 28 U.S.C. § 1491, seeking to recover back pay, benefits and damages to his private law practice; restoration to his part-time position or appointment to a full-time position; and placement in the appropriate retirement status. (Petition, B6-B7)

Respondent brought a motion for summary judgment. The Court of Claims granted it, holding that Petitioner had resigned, terminating any entitlement to the part-time position and that the Court of Claims did not have the power to award the full-time position or its emoluments. (Order, A3)

REASONS FOR GRANTING THE WRIT

I. WHEN THE COURT OF CLAIMS GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, IT IMPROPERLY MADE A FINDING OF FACT.

The Court of Claims committed reversible error when it granted Respondent's motion for summary judgment. The Court held that Petitioner had resigned his part-time position in his letter of May 9, 1979, and consequently was not entitled to either reinstatement in the position or its salary and benefits. Whether the letter had the legal effect of a resignation was a question of fact. Petitioner had presented both legal and factual arguments why his letter could not be considered a resignation as a matter of law.

A motion for summary judgment cannot be granted when there is the existence of a genuine issue as to a material fact. Fed. R. Civ. P. 56(c). A court has no

discretion in granting a motion for summary judgment but may determine only whether an issue of fact exists. The court must not resolve an actual issue. United States v. Diebold, 369 U.S. 654 (1962). Where genuine issues of fact do appear, inferences drawn from the underlying facts presented by the non-moving party must be reviewed in the light most favorable to him. Diebold, supra.

Those inferences establish a contract with the Respondent, a shocking and sudden breach, a fervent appeal and promise to continue if called upon.

A. Whether Petitioner's Letter of May 9 Was a Resignation Is a Genuine Issue of Material Fact.

Petitioner argues that the letter to Judge Neill was not a resignation. A fair reading of the letter in its entirely and an analysis of it in view of the

circumstances under which it was written support his argument. The letter plainly shows that Petitioner expressed a desire and willingness to continue as magistrate and that he requested Judge Neill to reconsider his decision. The letter was an act of frustration and regret, a formal complaint, and a plea for reconsideration to which Judge Neill failed to respond.

B. Even if the Letter Can Be Considered a Resignation, the Resignation Was Involuntary and Therefore Ineffective. Voluntariness Is a Factual Question.

In its holding, the Court of Claims did not address the issue raised in the Petitioner's reply to Respondent's motion that the letter, if construed to be a resignation, was elicited under duress. An action is not voluntary when it is brought about by government conduct which

is wrongful. Roskos v. United States, 549 F.2d 1386 (Ct. Cl. 1977). Petitioner feared for his professional reputation, correctly believing that the consensus of the community in which he practiced was that he had been terminated for misfeasance and malfeasance. Fear of adverse professional consequences which may result from a failure to resign, when the fear is the reason for the resignation, negates a question of voluntariness. Gratehouse v. United States, 512 F.2d 1104 (Ct. Cl. 1975). The letter of May 9, 1979, must be viewed as the only way Petitioner had to counter the innuendos and inferences of misconduct that were raised by his removal. Voluntariness is a question of fact and is not appropriately decided on a motion for summary judgment. Gratehouse v. United States, supra.

No matter what interpretation is given the letter, that interpretation is not dispositive of Petitioner's claim. Petitioner is claiming he was wrongfully denied the full-time position or, alternatively, he was wrongfully discharged from his part-time position before his four year term, provided by the Magistrates Act, expired. Petitioner's claim to reinstatement to the part-time position and benefits was dismissed by the Court when it granted the motion for summary judgment. Petitioner is now asking that the Supreme Court remand the case to the Court of Claims with instructions to hear evidence on the issue of the effect of the May 9, 1979, letter, as well as the merits of his claim.

II. BECAUSE PETITIONER CAN SHOW AN ENTITLEMENT TO THE FULL-TIME MAGISTRATE'S POSITION, CONSENT BY CONGRESS TO BE SUED, AND LACK OF ANY ALTERNATIVE REMEDIES, THE COURT OF CLAIMS HAS THE POWER TO REINSTATE HIM AND AWARD BACK PAY AND BENEFITS.

The Court of Claims also granted a motion for summary judgment on the Petitioner's claims of entitlement to the full-time magistrate position and back pay. The Court said that it was without power to award either the position or the back pay because Petitioner showed neither legal entitlement to the office nor consent by Congress to be sued. The Court's conclusion is incorrect. Petitioner has shown that he is entitled to the position and that Congress has waived sovereign immunity because of the entitlement.

A. Petitioner's Entitlement to the Position Is Based on a Contract Implied in Fact and on Federal Statutes and Regulations.

First, the Petitioner has a contract implied in fact. A contract implied in fact is derived from the presumed intention of the parties as indicated by their conduct. Martin v. Campanaro, 156 F.2d 127 (2d Cir. 1946), cert denied 329 U.S. 759 (1946). The acts of the judges of the District Court for the Eastern District of Washington indicate that Petitioner was to be appointed to the full-time position. A magistrate is subject to appointment and dismissal by the judges of the district in which he serves. 28 U.S.C. § 631(a), (i). Judge Neill had the authority to continue Petitioner's duties in the full-time position. When the position was converted to full time and the appointment made, Judge Neill was the only federal district judge in the

Eastern District of Washington. Petitioner justifiably relied to his detriment on Judge Neill's representations. In his twenty-two years of service, Petitioner received many expressions of gratitude and confidence from district court judges. He had been urged to continue in his office with assurances that his salary would increase and with knowledge that the position would eventually be converted to full-time. When he was asked by Judge Neill, and as his duties as magistrate began to demand more of his time, he curtailed his private practice, relying on representations that he would be appointed to the full-time position. Judge Neill told Petitioner that all that was necessary before his appointment to the position was the approval of the local bar association. These understandings and representations of the men who

had the authority to give him the position secured for the Petitioner a contract implied in fact. A contract in fact is implied where there are circumstances which, in the ordinary course of dealing and the common understanding of men, show a mutual intent to contract. Baltimore and Ohio Ry. v. United States, 261 U.S. 592 (1923).

This court recognized an implied contract in fact from rules and understandings in Perry v. Sindermann, 408 U.S. 593 (1972). In its discussion the court cited favorably from 3 A. Corbin, Corbin on Contracts § 562 (1960). That section says, in part,

> When a court finds and enforces such a promise as this, it finds it by interpretation of the promissor's words and conduct in the light of the surrounding circumstances. . . . It is the same whether the contractor expressed his intentions in the form of words, oral or written, or expressed

> them by conduct wholly non-verbal, or used both forms of expression together. . . . Even silence and inaction, when the known circumstances make an inference of assent reasonable, may be interpreted as the making of a promise.

Petitioner's belief that he would be appointed to the full-time position was also based upon the selection procedures adopted by the United States Judicial Conference. The procedures provided:

> When a part-time magistrate position is upgraded to full-time, the incumbent part-time magistrate should be subject to consideration for the full-time position as if he were a full-time magistrate whose term was expiring.

Standards and Procedures of the Judicial Conference of the United States for the Appointment of United States Magistrates, Nominating Commission, IV(C). These same procedures disqualified Mr. Myers because he would have reached the age of seventy before his term expired, in violation of

the Standards and Procedures, Standards for Selection of Magistrates, I(E), and because he had been appointed without public notice of the opening as required by the Standards and Procedures, Court Action, I(A).

In September, 1978, the Judicial Conference specifically directed the district courts to comply with the regulations adopted in 1978. Reports of the Proceedings of the Judicial Conference of the United States Held at Washington, D.C. March 10, 1978 and September 21-22, 1978; Committee on the Administration of the Magistrate System; Selection of Magistrates. H14-H15. The selection of Mr. Myers and dismissal of Petitioner were not made in accordance with the regulations. An agency of the government must scrupulously observe rules, regulations, or procedures which it has

established. If it fails to follow them, the courts will strike down actions the agency has taken. United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954). Once the Judicial Conference had directed the district courts to follow the selection procedures in September of 1978, Judge Neill could not select a full-time magistrate without regard to those procedures.

This argument is further supported by the regulations adopted by the Judicial Conference in March of 1980 in response to an amendment to the Federal Magistrates Act (28 U.S.C. § 631(b)(5)). These provisions are nearly identical to those adopted in March of 1978 but a new section, Chapter 8, entitled "Transitional Provisions," provides:

> Selection of nominees made prior to the effective date of these regulations shall be deemed to be made in accordance

> with these regulations, provided, however: (a) that the appointing court has complied with the procedures set forth in the guidelines of the Judicial Conference for the Appointment of United States Magistrates which were established by the conference in March 1977 [sic]; and (b) that the nominee for appointment has been selected pursuant to procedures which have included a public notice of any vacancy and the establishment and utilization of a merit selection panel composed of residents of the district; and (c) the nominee meets all statutory qualification standards and requirements of the Federal Magistrate's Act, as amended.

Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment of United States Magistrates (March, 1980) Chapter 8, Sec. 8.01.

B. Failure to Appoint Petitioner to the Full-Time Position Was Denial of Due Process, a Wrongful Personnel Action Entitling Him to Back Pay and Reinstatement.

The Fifth Amendment mandates that the Petitioner not be deprived of property without due process of law. Petitioner has shown that he has an entitlement to the full-time position arising out of a contract implied in fact based upon understandings, rules, and regulations. Contractual rights with the United States are "property" and are protected by the Fifth Amendment. Lynch v. United States, 292 U.S. 571 (1934). Further, where a statute, regulation, rule or practice prescribes qualifications and methods, a person governed by those statutes, regulations, rules, or practices has a protected interest in seeing that they are followed and applied to the individual. Vitek v. Jones, 445

U.S. 480 (1980) (statute and official practice); Perry v. Sindermann, 408 U.S. 593 (1972) (rules and understandings); Board of Regents v. Roth, 408 U.S. 564 (1972) (terms of appointment). In Sindermann, the court recognized a constitutionally protected property right in employment based on words and conduct of a public employer.

If Petitioner has a protected property interest, he has a right to the due process that was denied him. Petitioner was summarily dismissed from office. His only administrative remedy was an appeal to Judge Neill to reconsider. Such an appeal is not an adequate remedy. Judge Neill had dismissed Petitioner and failed to honor his agreement to appoint Petitioner to the full-time position. At the very least, due process requires that notice and opportunity for a hearing

appropriate to the situation must precede any deprivation of property. Goss v. Lopez, 419 U.S. 565 (1975). Petitioner received no notice, hearing, or reasons for his dismissal.

Judge Neill's failure to appoint Petitioner to a position to which he was entitled was an unjustified and unwarranted personnel action. Petitioner could be deprived of his entitlement only if he were afforded due process. The Back Pay Act authorizes government employees who are deprived of salary and benefits because of unjustified personnel action to receive their back pay when they can show a violation of an applicable law, rule, regulation, or collective bargaining agreement. 5 U.S.C. § 5596. Petitioner was denied due process and has no administrative remedies. Because Petitioner can point to the Constitution,

statutes, and regulations as the source of his entitlement to the full-time position, Congress has explicitly waived sovereign immunity in the Back Pay Act.

In DiLuigi v. Kafkalas, 437 F.Supp. 863 (M.D.Pa. 1977), vacated on other grounds, 584 F.2d 22 (3rd Cir. 1978), cert. denied, 440 U.S. 959 (1979), the court held that the Back Pay Act expressly authorized the award of back pay to a government emplcyee who had been wrongfully terminated in violation of the due process clause of the Fifth Amendment. The court said that reinstatement and back pay were appropriate remedies because any lesser remedies would depreciate the seriousness of the violation of due process. Petitioner here is seeking the same relief for the same reason - the violation of his Fifth Amendment rights.

Back pay and reinstatement are the appropriate award.

C. The Court of Claims Is Authorized to Award Claims Based on Contract and Federal Statutes and Regulations.

The Tucker Act, 28 U.S.C. § 1491, gives the Court of Claims jurisdiction to render judgment on claims against the United States based on the Constitution, an act of Congress, a regulation of an executive department, or upon any express or implied in fact contract with the United States. The Act also allows the Court, as an incident to any monetary judgment, to restore a claimant to office.

The Court of Claims refused to hear Petitioner's claim to the full-time position, holding that it did not have the power to reinstate Petitioner or award him back pay and benefits. The Court

concluded that Petitioner had no grounds on which to sue the United States because he could show no legal entitlement and that he had no legal entitlement because he had not been appointed. The Court seemed to agree that Petitioner had a property right, but that alone was insufficient.

The Court based its decisions on United States v. Testan, 424 U.S. 392 (1976), but its reliance was not justified. The respondents in Testan were two attorneys who were dissatisfied with their job classification and sued for reclassification and back pay under the Classification Act, 5 U.S.C. § 5101, and the Back Pay Act, 5 U.S.C. § 5596. The respondents did not allege a breach of contract. The Supreme Court ruled against them, saying that neither the Classification Act nor the Back Pay Act

entitled the respondents to money damages. The rule of Testan is that one is not entitled to the benefit of a position until he has been duly appointed to it. Testan, supra, at 955. The Court said that the Back Pay Act did not apply to a wrongful classification action and that therefore there was no waiver of sovereign immunity. Finally, the respondents had administrative remedies.

Petitioner has shown why he has an entitlement under federal statutes and regulations and where Congress has agreed to be sued under the Back Pay Act because of that entitlement. Therefore, the Court of Claims has jurisdiction under the Tucker Act. But in addition, Petitioner's claim is based upon a breach of contract, a separate and distinct basis for jurisdiction under the Tucker Act, 28 U.S.C. § 1491. Petitioner must be

allowed to bring his action in the Court of Claims because that is the only forum available to him. Unlike respondents in Testan, Petitioner has no other remedies. The Court of Claims can award back pay and reinstate him to the full-time position. If he can not bring his action there, then he has a right with no remedy. The Court of Claims need not be worried about being inundated with a flood of claims. This situation involving a U.S. Magistrate is surely unique on its facts. The rule in Testan need not be reversed or even modified. Petitioner's claim falls outside the rule.

On the other hand, the Court of Claims, and no other court, has jurisdiction over contract claims with the United States where damages exceed $10,000. Alabama v. United States, 282 U.S. 502 (1931); National Bank of North

America v. United States, 456 F.2d 754 (Ct. Cl. 1972). Congress has never intended that the United States be able to contract with a citizen, breach the contract, and disregard a claim for damages with the defense of sovereign immunity. The Court of Claims has ignored this Court's decisions in Vitek v. Jones, 445 U.S. 480 (1980), Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). It refuses to recognize the Petitioner has a right to be heard on the merits of his contract claim.

Unless this Court grants the writ of certiorari, Petitioner will be denied all access to a remedy. The Court of Claims erred in granting a summary judgment when it decided a question of fact and when it misinterpreted its power to grant relief to Petitioner.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS
No. 500-80C

VICTOR J. FELICE

v.

THE UNITED STATES

Federal magistrate; expectation of part-time to be appointed to full-time.

Nicholas P. Scarpelli, Jr., attorney of record, for plaintiff. Carney, Stephenson, Badley, Smith & Mueller, of counsel.

Stephen G. Anderson, with whom was Assistant Attorney General J. Paul McGrath, for defendant.

Before COWEN, Senior Judge, DAVIS and NICHOLS, Judges.

O R D E R

Mr. Felice, the plaintiff, was a part-time U.S. magistrate who served in the Eastern District of Washington by appointment of the local United States

District Judges under the rules set by the Judicial Conference of the United States, 28 U.S.C. § 631 and ff. Since his original appointment as a part-time U.S. commissioner in 1956, he had served successive 4-year terms as commissioner, and magistrate when the job title and duties were changed by law. His final reappointment was under date of January 24, 1979, and the conversion of the position to full-time status having been authorized by the conference, this appointment was limited by its terms to expire January 31, 1983, or at such earlier date as a full-time magistrate might be appointed. The suit is for back pay as a part-time or full-time magistrate, for loss of fringe benefits, and for reinstatement in a part-time or full-time position, or placement in an appropriate retirement status. Both

parties move for summary judgment. We hold that plaintiff effectively resigned the part-time position, terminating his entitlement to its emoluments, and that the full-time position or its emoluments are beyond our power to award.

Plaintiff was a candidate for the full-time position, but on May 7, 1979, the Chief Judge of the district, The Honorable Marshall A. Neill, notified him that another person had been selected. Plaintiff responded May 9, 1979, with an embittered letter which is at the crux of the litigation. He said that the judge had served without criticism for 22 years, that Judge Neill had failed to follow the guidelines of the Judicial Conference concerning magistrate selection, that the Judge knew of the writer's interest in the full-time position, that the selectee would, contrary to the guidelines, exceed

the age of 70 before finishing his term, that the action obliterated the writer's accrued pension rights, that in 24 hours since receipt of the notice, the writer had struggled with feelings of anger, sadness, embarrassment, frustration, dignity, and loyalty; and finally, that --

> * * * it is with the deepest regret and sadness that I hereby submit my resignation, effective immediately, as the United States Magistrate.

He went on to say if Judge Neill should reconsider, or should the selectee decline the office, he would discuss the matter further --

> Similarly, I remain available to serve if called upon, as I have dedicatedly and loyally served for twenty-two years.

On May 15 the Administrative Office of the United States Courts sent a Form 250, Notification of Personnel Action, to Judge Neill, copy to Mr. Felice, formalizing the resignation

as of May 9, and thereafter, the office was treated as vacant. As the existence of a vacancy created something of an emergency, the selectee for the full-time position was appointed and took office to fill the remaining term of the part-time position, May 21, 1979. We gather that a question of funding forced a short deferment of filling immediately the full-time position. The selectee did, however, receive appointmnt [sic] to the full-time position June 4, 1979.

It is suggested on plaintiff's behalf that the resignation was not really a resignation, but something else. One can sympathize with Mr. Felice's feelings, but the statement that he resigns seems plain enough, and were it less plain, he was promptly notified that the Administrative Office recorded him as having resigned, and he took no step to

correct the error it it was one. Having resigned, Mr. Felice cannot claim the emoluments of the part-time position for the brief time it continued to exist.

Turning now to the full-time position that has existed in the district since June 4, 1979, plaintiff says that the judges of the district in making their selection did not follow the 1978 guidelines of the Judicial Council in several respects. Plaintiff is, however, in the position that he was never appointed to the full-time position, and the Back Pay Act, 5 U.S.C. § 5596, did not confer entitlement to the pay of a position to which one was never appointed. United States v. Testan, 424 U.S. 392 (1976); Sanders v. United States, 219 Ct.Cl. 285, 594 F.2d 804 (1979). Plaintiff says the Council guidelines give a part-time magistrate the right to be considered for

the job when a full-time magistrate position is first created.

Plaintiff argues that this expectation amounts to a property right under the concepts floated by the U. S. Supreme Court in Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972). Yet the mere existence of such a right does not necessarily mandate enforcement of it in this court through award of back pay. Testan, supra. Plaintiff has not shown any consent by Congress to the litigation in this court of his claim for promotion to a position he never held. Plaintiff does not show any legal entitlement to the position that existed without the prior favorable consideration of his name by the judges of the district.

Accordingly, plaintiff's claim to the pay of the full-time position fails, and in this court, if that fails, everything fails.

Upon consideration of the motions of both sides for summary judgment it is determined that, there is no triable issue of relevant fact, the motion of plaintiff for summary judgment is denied, the motion of defendant for summary judgment is granted, and the petition is dismissed.

BY THE COURT

/s/
PHILIP NICHOLS, JR.
Judge

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS
No. 500-80C

VICTOR J. FELICE
Petitioner

v.

THE UNITED STATES
Respondent

PETITION

For claim against respondent, petitioner alleges as follows:

I

The United States Court of Claims has jurisdiction under 28 U.S.C. § 1491.

II

Petitioner commenced an action arising out of the same conduct and circumstances described below in the United States District Court for the Eastern District of Washington under Cause No. C-80-165 on May 23, 1980. Thereafter, petitioner and respondent stipulated and agreed, pursuant to

F.R.C.P. 41(a)(1)(ii), that petitioner take a voluntary nonsuit without prejudice. An order granting the voluntary nonsuit was entered on August 25, 1980.

III

At all times material hereto, the federal employees named herein were acting in their official capacities as agents for the respondent.

IV

On July 25, 1956, Federal Judge Samuel Driver appointed the petitioner as a part-time United States Commissioner for the Eastern District of Washington, for a term of four years. In the years of 1960, 1964 and 1968, petitioner was reappointed as a part-time United States Commissioner for the Eastern District of Washington for a term of four years by Federal Judge Charles Powell. On March 31, 1969, pursuant to 28 U.S.C.

§ 631, et seq., Federal Judge Charles Powell appointed petitioner as a part-time United States Magistrate for the Eastern District of Washington for the statutory term of four years. On January 25, 1975, Federal Judge Marshall Neill and Federal Judge William Goodwin reappointed petitioner as part-time United States Magistrate for the Eastern District of Washington for a four-year term to expire on January 31, 1979. On January 24, 1979, Federal Judge Marshall Neill and Federal Judge Jack Tanner reappointed petitioner as part-time United States magistrate for a four-year term to expire on January 31, 1983, or at such earlier date as a full-time United States magistrate may be appointed. Petitioner executed all necessary documents, took his oath of office and continued to carry out his duties and responsibilities as he

had done without interruption during the preceding 22 years as United States Commissioner and United States Magistrate.

V

On May 7, 1979, Judge Marshall Neill advised petitioner that Judge Neill had nominated Smithmoore P. Myers as the new full-time United States Magistrate and that petitioner's position as part-time United States Magistrate would terminate upon qualification of Mr. Myers to the new full-time position. The availability of the position of full-time magistrate was not announced to the public, there was no opportunity for petitioner or other persons to apply for the position, no hearings were held either with respect to the termination of petitioner's position or the selection and appointment of Mr. Myers as full-time magistrate, petitioner received no notice of the

availability of the full-time position and had no opportunity to apply for the position of full-time magistrate. Federal Judge Marshall Neill terminated the part-time position of petitioner without a hearing, notice or other elements of due process, within less than four months of the beginning of the four-year term to which petitioner had been reappointed. Petitioner had capably served for 22 years in the part-time position and desired to continue to so serve, and further desired to serve full-time when the administrative office of the United States Courts created a full-time magistrate for the Eastern District of Washington.

VI

The dismissal and termination of petitioner under the circumstances was contrary to the provisions of 28 U.S.C.

§ 631, et seq., was a denial of petitioner's constitutionally protected rights, and was in breach of an express and/or implied contract between petitioner and respondent, and upon which contract petitioner had relied to his detriment.

VII

The actions of respondent and its agents described above caused petitioner damages by way of lost employment, lost income and other employment benefits, loss of retirement and/or pension income and other employment benefits, and damage to his private law practice.

WHEREFORE, petitioner demands judgment and relief as follows:

1. Money damages to be proven at the time of trial for lost employment, lost income and other employment benefits, loss of retirement and/or pension income

and other employment benefits, and damage to petitioner's law practice;

2. Restoration to his office as a part-time magistrate or appointment to a full-time magistrate position.

3. Placement in an appropriate retirement status with all the benefits accruing therefrom;

4. For such other just and equitable relief as the Court deems fit and proper.

DATED this 12th day of September, 1980.

Respectfully submitted,

CARNEY, STEPHENSON, SIQUELAND, BADLEY, SMITH & MUELLER

By /s/
Nicholas P. Scarpelli, Jr.
Attorneys for Petitioner

1710 Park Pl. Bldg.
Seattle, WA 98101
(206) 622-8020

APPENDIX C

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

BACK PAY ACT
5 U.S.C. § 5596

(a) For the purpose of this section, "agency" means --

(1) an Executive agency;

(2) the Administrative Office of the United States Courts;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia.

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted

personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee --

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect --

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the

personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701(g) of this title; and. . . .

APPENDIX E

FEDERAL MAGISTRATES ACT

as amended by

FEDERAL MAGISTRATES ACT OF 1979
28 U.S.C. §§ 631, 633, 634

§ 631. Appointment and tenure

(a) The judges of each United States district court and the district court of the Virgin Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the the conference may determine under this chapter. In the case of a magistrate appointed by the district court of the Virgin Islands, this chapter shall apply as though the court appointing such magistrate were a United States district court. Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of

all the judges of such district court, and when there is no such concurrence, then by the chief judge.

* * *

(b) No individual may be appointed or reappointed to serve as a magistrate under this chapter unless:

* * *

(5) He is selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate positions and for the establishment by the district courts of merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to

fill such positions. [Effective April 5, 1980.]

* * *

(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate shall be for a term of four years, except that the term of a full-time or part-time magistrate appointed under subsection (j) shall expire upon --

(1) the expiration of the absent magistrate's term,

(2) the reinstatement of the absent magistrate in regular service in office as a magistrate,

(3) the failure of the absent magistrate to make timely application under subsection (i) of this section for reinstatement in regular service

in office as a magistrate after discharge or release from military service,

(4) the death or resignation of the absent magistrate, or

(5) the removal from office of the absent magistrate pursuant to subsection (h) of this section,

whichever may first occur.

* * *

(i) [formerly (h)] Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. Removal shall be by the judges of the district court for the judicial district in which the magistrate

serves; where there is more than one judge of a district court, removal shall not occur unless a majority of all the judges of such court concur in the order of removal and when there is a tie vote of the judges of the district court on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council. In the case of a magistrate appointed under the third sentence of subsection (a) of this section, removal shall not occur unless a majority of all the judges of the appointing district courts concur in the order of removal; and where there is a tie vote on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of the judges of the council or

councils. Before any order or removal shall be entered, a full specification of the charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council, or councils an opportunity to be heard on the charges.

§ 633. Determination of number, locations, and salaries of magistrates

* * *

(3) The surveys shall be made with a view toward creating and maintaining a system of full-time United States magistrates. However, should the Director find, as a result of any such surveys, areas in which the employment of a full-time magistrate would not be feasible or desirable, he shall recommend the appointment of part-time United States magistrates in such numbers and at such locations as may be required to

permit prompt and efficient issuance of process and to permit individuals charged with criminal offenses against the United States to be brought before a judicial officer of the United States promptly after arrest.

§ 634. Compensation

(a) Officers appointed under this chapter shall receive as full compensation for their services salaries to be fixed by the conference pursuant to section 633 of this title, at rates for full-time and part-time United States magistrates not to exceed the rates now or hereafter provided for full-time and part-time referees in bankruptcy, respectively, referred to in section 40a of the Bankruptcy Act (11 U.S.C. 68(a)), as amended, except that the salary of a part-time United States magistrate shall

not be less than $100 nor more than one-half the maximum salary payable to a full-time magistrate. In fixing the amount of salary to be paid to any officer appointed under this chapter, consideration shall be given to the average number and the nature of matters that have arisen during the immediately preceding period of five years, and that may be expected thereafter to arise, over which such officer would have jurisdiction and to such other factors as may be material. Disbursement of salaries shall be made by or pursuant to the order of the Director.

(b) Except as provided by section 8344, title 5, relating to reductions of the salaries of reemployed annuitants under subchapter III of chapter 83 of such title and unless the office has been terminated as provided in this chapter,

the salary of a full-time United States magistrate shall not be reduced, during the term in which he is serving, below the salary fixed for him at the beginning of that term.

APPENDIX F

TUCKER ACT
28 U.S.C. § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the

United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. . .

[illegible]/

APPENDIX G

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56 Summary Judgment

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability

alone although there is a genuine issue as to the amount of damages.

APPENDIX H

March 1978

STANDARDS AND PROCEDURES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE APPOINTMENT OF UNITED STATES MAGISTRATES

In 1968 Congress enacted the Federal Magistrates Act, which has resulted in the increased use of magistrates and has contributed to the more efficient administration of justice. It is contemplated that magistrates will be given additional civil and criminal jurisdiction, and it is imperative that qualified persons be selected and retained as magistrates to carry out these important responsibilities. To provide for uniformity in the appointment of magistrates and to ensure the selection and retention of highly competent persons as magistrates, the Judicial Conference of the United States establishes the following procedures and standards to be used as guidelines by the

courts in selecting full-time magistrates, and part-time magistrates receiving a salary of at least one-third of the maximum amount authorized by statute for a full-time magistrate.

STANDARDS FOR SELECTION OF MAGISTRATES

I. To be qualified for appointment, potential nominees should meet the following standards:

(A) They must be members in good standing of the bar of the highest court of the state in which the person selected is to serve or, in the case of an individual appointed to serve --

(1) In the District of Columbia, a member in good standing of the bar of the District of Columbia.

(2) In the commonwealth of Puerto Rico, a member in good standing of the bar of the Supreme Court of Puerto Rico.

(3) In the Virgin Islands of the United States, a member in good standing of the bar of the Virgin Islands.

(4) In an area under the administration of the National Park Service, the United States Fish and Wildlife Service, or any other federal agency that extends into two or more states, a member in good standing of the bar of the highest court of one of those states.

(B) They should have been engaged in the active practice of law for a period of five years. The court may consider as substitute experience for the active practice of law the following, including any combination thereof:

(1) Judge of a state court of record.

(2) Other state judicial officer.

(3) United States magistrate.

(4) Referee in bankruptcy.

(5) Other federal judicial officer.

(6) Attorney for federal or state agencies.

(7) Law clerk to any judge or judicial officer (limited to two years).

(8) Other legal experience which is suitable as a substitute in the opinion of the majority of the court.

(C) They should be competent to perform the duties of the office, of good moral character, emotionally stable and mature, committed to equal justice under the law, in good health, patient, courteous, and capable of deliberation and decisiveness when required to act on their own reason and judgment.

(D) They must not be related by blood or marriage to a judge of the appointing court or courts within the degrees specified in 28 U.S.C. §455(b)(5) at the time of the initial appointment.

(E) In the case of an initial appointment, they will not reach the age of 70 years before the expiration of the term of appointment.

II. A district court may include additional qualification standards appropriate for a particular magistrate's position, taking into account the specific responsibilities anticipated for that position.

III. To implement the above standards, the court may adopt such additional criteria or guidelines as it considers appropriate for the selection of the best qualified individuals to serve as United States magistrates.

COURT ACTION

I. Public Notice

(A) In the case of a new appointment or if the present magistrate is not

selected by the district judges for reappointment, the court should make a public announcement of the vacancy. The public notice should be published in a bar journal, newsletter, local legal periodical, or general local newspaper or similar publication and should be filed and posted in the district clerk's office. The public announcement should describe the duties of the position, the qualification standards, and the procedure for submission of applications, including the name and address of the person to whom applications should be submitted.

(B) The public notice should specify that applications are to be submitted only by the potential nominee personally, indicating the person's willingness to serve if selected.

II. Selection

The selection of magistrates should be by a majority vote of the active district judges. In the event a majority of the district court cannot agree upon any one person, the chief judge shall make the appointment.

III. Judicial Council

(A) The name of the person selected by a majority of the district court for appointment or reappointment as a magistrate should be submitted to the Judicial Council of the Circuit. The Judicial Council of the Circuit should certify that the appointee is competent to perform the duties of the office. Announcement of the appointment should be made by the district court after notice of the Judicial Council's certification has been received and a background investigation has been completed by the Federal Bureau of Investigation.

(B) If the Judicial Council refuses to certify the person selected, the district court may select another person.

NOMINATING COMMISSION

I. Establishment of Nominating Commission

(A) At the time a magistrate position to which these standards and procedures are applicable is created, or at a reasonable time before the term of such a position expires or an existing position becomes vacant for any reason, the judges of the district court may, in their discretion, appoint a nominating commission. The commission should recommend for nomination persons whose character, experience, ability, and commitment to equal justice under the law fully qualify them to serve as United States magistrates.

(B) The commission should begin to function when the Chief Judge of the

district court notifies its chairman that the commission's assistance is needed to select the nominees to fill a vacancy.

(C) Members of the commission should receive no compensation for their service, but they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law.

(D) Each appointment to the commission should terminate thirty days after submission of the commission's final report to the Chief Judge.

II. Membership

(A) The commission should be composed of a chairman and other members appointed by a majority vote of the active district judges of the district. The commission should have no less than six members, including the chairman.

(B) The chairman should have such duties as the district judges may assign.

(C) The commission should consist of lawyers and other leading members of the community. Each member of the commission should be a resident of the district and of the division (if any) within which the appointment is to be made.

III. Duties

(A) All information made available to the members of the commission in the performance of their duties, including the names of potential nominees and the identity of persons recommended by the commission, should be kept in strictest confidence.

(B) All decisions of the commission should be by majority vote of the members.

(C) The commission should examine that applications of potential nominees and may, in its discretion, personally interview potential nominees.

(D) The commission should first determine those persons among the potential nominees who meet all of the standards set forth herein for appointment as a United States magistrate.

(E) The commission should then designate the five persons whom it considers the best qualified to serve as a United States magistrate.

(F) The commission should render a report to the Chief Judge as directed in the following section.

IV. Report to Chief Judge

(A) If a new appointment is to be made to a vacant or newly-created position, the commission should, within ninety days after the creation of the commission, report to the Chief Judge the results of its activities.

(B) If an appointment is to be made because of the expiration of the term of

the incumbent magistrate, the active district judges of the district should meet to determine whether a majority recommends reappointment, based on the standards for appointment set forth herein.

(1) If the majority of the district judges recommends the reappointment of the present magistrate, the Chief Judge should send the name of the magistrate to the circuit council for action pursuant to Paragraph III(A) of Court Action.

(2) If the majority of the district judges does not recommend the reappointment of the present magistrate, then the commission should, within ninety days after notification of the vacancy, report to the Chief Judge the results of its activities, including its determination as to the five persons to whom the commis-

sion considers best qualified to fill the vacancy.

(C) When a part-time magistrate position is upgraded to full-time, the incumbent part-time magistrate should be subject to consideration for the full-time position as if he were a full-time magistrate whose term was expiring.

(D) No person should be considered as a nominee while serving as a member of the commission or for a period of one year after the completion of such service.

REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON, D.C., MARCH 9-10, 1978, AND SEPTEMBER 21-22, 1978

* * *

Selection of Magistrates

The Conference was informed that the Senate-passed bill, S.1613, relating to the jurisdiction of magistrates, would require the Judicial Conference to promulgate procedures and standards to be followed by the courts in the selection of magistrates. These procedures and standards would supersede the guidelines previously approved by the Conference. A bill under consideration in the House of Representatives, however, would require the use of "magistrate selection panels" by the district courts.

In view of the likelihood of the enactment of legislation during the current session of the Congress, the

Committee has requested the staff of the Administrative Office to provide copies of the pending legislation and the Conference's previously-approved selection guidelines to those district courts which will be appointing or reappointing magistrates in the next several months. Specifically, the district courts are being advised to comply with the selection procedures set forth in the House bill in order to insure the validity of pending appointments in the event the House version of the bill is enacted.

APPENDIX I

REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ESTABLISHING STANDARDS AND PROCEDURES FOR THE APPOINTMENT OF UNITED STATES MAGISTRATES

United States magistrates exercise highly important judicial powers and responsibilities as officers of the United States district courts. It is therefore imperative that only highly qualified individuals be selected and retained as magistrates. To that end, and in accordance with section 631(b)(5) of title 28, United States Code, the Judicial Conference of the United States hereby promulgates these regulations for the selection and appointment of United States magistrates.

CHAPTER 1. QUALIFICATIONS OF UNITED STATES MAGISTRATES

Sec. 1.01. Minimum Qualifications.

To be qualified for appointment as a United States magistrate, nominees must meet the following standards:

(a) They must be, and have been for at least five years, members in good standing of the bar of the highest court of the state in which the person selected is to

serve or, in the case of an individual appointed to serve --

(1) In the District of Columbia, a member in good standing of the bar of the District of Columbia.

(2) In the Commonwealth of Puerto Rico, a member in good standing of the bar of the Supreme Court of Puerto Rico.

(3) In the Virgin Islands of the United States, a member in good standing of the bar of the Virgin Islands.

(b) They must have been engaged in the active practice of law for a period of at least five years. The court may consider as substitute experience for the

active practice of law the following, including any combination thereof:

(1) Judge of a state court of record or other state judicial officer.

(2) United States magistrate, referee in bankruptcy, bankruptcy judge, or other federal judicial officer.

(3) Attorney for federal or state agencies.

(4) Law clerk to any judge or judicial officer (limited to two years).

(5) Other legal experience which is suitable as a substitute in the opinion of the majority of the court.

(c) They must be competent to perform the duties of the office, of good moral character, emotionally stable and mature, committed to equal justice under the law, in good health, patient, courteous, and capable of deliberation and decisiveness when required to act on their own reason and judgment.

(d) They must not be related by blood or marriage to a judge of the appointing court or courts within the degrees specified in section 455(b)(5) of title 28, United States Code, at the time of the initial appointment.

(e) In the case of an initial appointment, they will not reach the age of seventy years

before the expiration of the term of appointment.

Sec. 1.02. Additional Qualifications. A district court may establish additional qualification standards appropriate for a particular magistrate position, taking into account the specific responsibilities anticipated for that position.

CHAPTER 2. PUBLIC NOTICE

Sec. 2.01. Publication. Prior to the selection of a magistrate, a public notice shall be published in a general local newspaper or similar publication and in a bar journal, newsletter, or local legal periodical.

Sec. 2.02. Contents of Notice.

Except as provided in section 6.02, the public announcement shall describe the duties of the position, the pertinent qualification standards, and the procedures for submission of applications, including the name and address of the person to whom applications should be submitted. The notice should specify that applications are to be submitted only by the potential nominee personally, indicating that person's willingness to serve if selected.

Sec. 2.03. Filing of Notice.

The public notice shall be filed and posted in the office of the clerk of court and a copy shall be provided to the Director of the Administrative Office.

CHAPTER 3. MERIT SELECTION PANEL

Sec. 3.01. Establishment of Panel.

Before the appointment of a United States magistrate is made, the court shall appoint a merit selection panel which shall recommend to the court for nomination individuals whose character, experience, ability, and commitment to equal justice under the law fully qualify them to serve as United States magistrate.

Sec. 3.02. Membership.

(a) The panel shall be composed of a chairman and other members appointed by majority vote of the active judges of the district court. The panel shall have no fewer than six members, including the chairman.

(b) Members of the panel shall receive no compensation for their services, but may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law.

(c) The panel shall consist of lawyers and other members of the community. Each member of the panel shall be a resident of the district within which the appointment is to be made.

(d) No person shall be considered as a nominee while serving as a member of the panel or for a period of one year after completion of such service.

Sec. 3.03. Duties.

(a) The chairman shall have such duties as the court may assign.

(b) All information made available to the members of the panel in the performance of their duties, including the names of potential nominees and the identity of individuals recommended by the panel, shall be kept in strict confidence except as provided in section 3.04 of these regulations.

(c) Decisions of the panel shall be by majority vote of the members.

(d) The panel should examine the applications of all potential nominees and may, in its discretion, personally interview potential nominees. The panel shall make an affirmative effort

to identify and give due consideration to all qualified candidates including women and members of minority groups.

(e) The panel should then determine those individuals among the potential nominees who meet all the standards set forth by these regulations for appointment for United States magistrate, and shall designate those individuals whom the panel considers best qualified to serve as United States magistrate.

(f) The panel shall submit a report to the court as provided in the following section.

Sec. 3.04. Panel Report.

If an appointment is to be made to a

vacant or newly created position, the panel shall within ninety days after its creation report to the court the results of its activities. The report of the panel shall specify the five persons the panel has determined as best qualified and have attached to it all written information received by or prepared by the panel concerning the recommended nominees. The court may accept a list containing fewer than five names for good cause shown by the panel in its report.

CHAPTER 4. APPOINTMENT OF MAGISTRATES

Sec. 4.01. Selection from List.

The district court shall select from the list provided by the panel. However, a district court may, by

majority vote, reject the first list submitted by the panel. If such list is rejected, the panel shall submit a second list from which the district court shall then select its magistrate.

Sec. 4.02. Majority Decision of the Judges.

The selection of an appointee shall be by majority vote of the active judges of the district court. In the event a majority of the court cannot agree upon any one individual, the chief judge shall make the selection.

Sec. 4.03. F.B.I. and I.R.S. Reports.

The name of the person selected by the court for appointment shall be submitted to the Director of the Administrative Office, who shall

request background reports by the Federal Bureau of Investigation and the Internal Revenue Service.

Sec. 4.04. Order of Appointment.

An order of appointment may be issued by the district court following receipt by the court of the information obtained from the Federal Bureau of Investigation and the Internal Revenue Service. If in the judgment of the court the Internal Revenue Service report has not been completed in a timely manner, it may waive the report provided that it has taken steps to insure itself that the nominee has filed returns as required.

Sec. 4.05. Oath of Office.

The appointee shall, prior to entering on duty as magistrate, take the oath or affirmation prescribed by section 453 of title 28, United States Code.

Sec. 4.06. Record of Appointment.

The appointment of the magistrate shall be entered of record in the district court, and notice of such appointment shall be given at once by the clerk of that court to the Director.

CHAPTER 5. SELECTION OF PART-TIME MAGISTRATES

Sec. 5.01. Alternative Procedures.

The provisions of section 1.01 through 4.06 of these regulations shall apply to the selection and

appointment of a part-time magistrate; except that, in the case of the appointment of a part-time magistrate whose authorized annual salary is less than one-third of the maximum salary authorized for a full-time magistrate:

(a) The court may, in lieu of the requirements of section 3.02 concerning the membership of merit selection panels, appoint a panel of less than six members, but not less than three members. Judges of the court, including senior judges, may serve on the panel, although at least two members of the panel must be other members of the community.

(b) The court may, in lieu of the requirement of section 3.03(d)

that the panel submit to the court a list of five nominees, authorize the panel to determine the size of the list submitted to the court.

(c) The court may waive the bar membership requirements of section 1.01 if the appointing court and the conference have determined that no qualified individual who is a member of the bar is available to serve at a specific location as provided in section 631(b) of title 28, United States Code.

CHAPTER 6. REAPPOINTMENT OF UNITED STATES MAGISTRATES

Sec. 6.01. Qualifications.

The provisions of chapter 1 of these regulations shall apply to the reap-

pointment of United States magistrates, except that the court may waive the bar membership requirement of section 1.01 for the reappointment of a part-time magistrate serving under section 401(b) of Public Law 90-578(1968).

Sec. 6.02. Procedures.

In the event the court desires to consider the reappointment of an incumbent magistrate, it may adopt the following procedures in lieu of the selection procedures set forth in chapters 2, 3, and 5 of these regulations:

(a) Public Notice.

The court shall cause to be published a public notice stating that it is required by

law to establish a panel of citizens to consider the reappointment of the incumbent magistrate to a new term of office.

The public notice shall be published in a general local newspaper or similar publication and in a bar journal, newsletter, or local legal periodical. The notice shall describe the duties of the position, state the date of expiration of the incumbent's current term of office, and it shall invite comments from members of the public. The notice shall include the name and address of the person to whom comments shall be submitted. A copy of the notice shall be filed and

posted in the office of the clerk of court and a copy shall be provided to the Director of the Administrative Office.

(b) Panel.

Before the reappointment of a magistrate, the court shall establish a panel as prescribed in section 3.02, or section 5.01(a) as the case may be, of these regulations. The panel shall review the incumbent's current service as magistrate and other experience, the comments from members of the bar and public, and other evidence of the incumbent's good character, ability, and commitment to equal justice under the law. The panel shall report to the court within

ninety days whether the incumbent is recommended for reappointment.

(c) Decision of the Court.

After due consideration of the report of the panel, the court shall make its determination as to whether to reappoint the incumbent or to proceed anew with the selection procedures prescribed in chapter 3 of these regulations.

CHAPTER 7. APPOINTMENTS TO COMBINATION POSITIONS

Sec.7.01. The court may consider the selection of an incumbent bankruptcy judge to fill a combination magistrate/bankruptcy judge position, or an incumbent clerk or deputy clerk of the

court to fill a combination magistrate/clerk or deputy clerk position, in the same manner as prescribed in chapter 6 for reappointments.

CHAPTER 8. TRANSITIONAL PROVISIONS

Sec. 8.01. Pending Appointments.

Selection of nominees made prior to the effective date of these regulations shall be deemed to be made in accordance with these regulations, provided, however: (a) that the appointing court has complied with the procedures set forth in the Guidelines of Judicial Confernce [sic] for the Appointment of United States Magistrates which were estab-

lished by the conference in March 1977; and (b) that the nominee for appointment has been selected pursuant to procedures which have included a public notice of any vacancy and the establishment and utilization of a merit selection panel composed of residents of the district; and (c) the nominee meets all statutory qualifications standards and requirements of the Federal Magistrates Act, as amended.

APPENDIX J

IN THE UNITED STATES COURT OF CLAIMS
NO. 500-80C

VICTOR J. FELICE,
Plaintiff,

vs.

THE UNITED STATES,
Defendant.

AFFIDAVIT OF VICTOR J. FELICE

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

VICTOR J. FELICE, being first duly sworn, upon oath deposes and says:

1. I am the plaintiff in the above-captioned cause and make this Affidavit on personal knowledge and belief.

2. On July 25, 1956, I was appointed United States Commissioner for the Eastern District of Washington, for a four-year term. In 1960, 1964 and 1968 I was reappointed United States Commissioner for four-year terms. In 1971 I was appointed part-time United States

Magistrate for the Eastern District of Washington for four years. In 1975 and 1979 I was reappointed part-time United States Magistrate. My annual salary for these terms of offices are set forth on Exhibit 1 to this Affidavit.

3. During my terms of office I was called upon and available seven days a week, including holidays, and was required to provide services of my office to agents of the Federal Bureau of Investigation, the Secret Service, the Immigration Office, the United States Marshall, Drug Enforcement Units, and the United States Attorney, at any hour of the day or night. My office was "part-time" by title, but the demands of my office were considerably more that "part-time." During my terms of office, I am proud to say, I was always available to serve the government's needs.

4. As the Salary Schedule set

forth in Exhibit 1 indicates, my compensation was not commensurate with the demands and time requirements of the office. However, as the years passed, the salary and benefits generally increased, and I continued in the positions on the assurances provided to me by the District Court Judges appointing me that the benefits of my office would increase. On several occasions I advised the late Judge Charles L. Powell, that the demands of the office were too time-consuming for the compensation provided. He urged me to continue in the office with promises that more equitable compensation would be forthcoming. However, all the while I served as part-time United States Magistrate during Judge Powell's tenure, he expressed gratitude at my willingness to serve as part-time United States Magistrate despite the growing

demands on my time and resulting constraints on my private law practice. Judge Powell's letter to me of March 31, 1971, is attached hereto as Exhibit 2 to this Affidavit. Judge Powell also indicated to me that eventually the part-time position would be most likely converted to a full-time position with a substantial increase in salary, and that I would be the obvious choice to fill the full-time position of United States Magistrate. With these assurances I remained in office and curtailed my law practice as demands on my time increased.

5. The fact of inadequate pay for the time required by the office was also recognized by the late Judge Marshall A. Neill. He likewise urged me to continue in the position as part-time United States Magistrate during those years when the salary was grossly inadequate. Judge

Neill's letter to me of April 23, 1974, is attached hereto as Exhibit 3 to this Affidavit. In this letter, Judge Neill acknowledged the inadequate compensation I was receiving and made the same request that had been made of me since 1956: that I bear with the government because the compensation and benefits would improve. Judge Neill's letter to Judge Richard H. Chambers, bearing date of June 7, 1974, is attached hereto as Exhibit 4 to this Affidavit. Likewise, this letter indicates Judge Neill's recognition that I could not continue in the office without substantial salary adjustments. The demands on my time during this period of my office severely cut into the amount of time I could devote to my law practice. Again, I continued, however, based on the assurances given me by Judge Neill that the benefits of the

office would eventually provide adequate compensation. I was also aware during this period of time that the part-time position would most likely be converted to a full-time position in the future, and for this reason I continued despite the inadequate compensation.

6. In 1975, Judge Neill requested that I completely discontinue my state criminal law practice. About 30 percent of my private law practice concerned criminal matters, and since as United States Magistrate I could not practice criminal law in federal courts, this 30 percent of my private law practice was devoted to state criminal work. Despite the financial burden Judge Neill's request had upon my private law practice, I was willing to discontinue the criminal practice in state courts because I was aware by the constant growth of the United

States Magistrate's work load, and the satisfaction of the federal judicial system with the services being provided by magistrates, as well as the gradual expansion of magistrate's duties, that my position eventually would be converted to a full-time position.

7. I advised Judge Neill in 1977 that when the position was converted to full time I wished to be appointed a full-time United States Magistrate. Judge Neill said nothing to me which would indicate I would not be appointed to the full-time position, and in fact led me to believe that he would nominate me when the position was authorized. Judge Neill also, during this period of time, requested that I attend a seminar in 1977, specifically for full-time magistrates. A copy of Judge Neill's letter to me of May 19, 1977, making such request

is attached hereto as Exhibit 5 to this Affidavit. I did attend this seminar. A copy of the face sheet of the program is attached hereto as Exhibit 6 as is Exhibit 7, a copy of the Certificate of Training which I received. The fact that Judge Neill encouraged and requested me to obtain the training offered to full-time magistrates reinforced my already well-founded belief that I would be appointed to the full-time position when it became authorized for the State of Washington.

8. In 1978, I learned that a full-time United States Magistrate's position was authorized for the Eastern District of Washington. At a later date I made a special trip to see Judge Neill at the United States Court House to specifically discuss the new full-time position and to again inform Judge Neill that I definitely

wanted to be appointed to the full-time position. I also informed Judge Neill that I was ready and willing to leave my law practice to assume full-time duties and responsibilities of the office of magistrate. I was aware of the fact that as the incumbent part-time United States Magistrate I would be given special consideration for the full-time position as if I had already been appointed the full-time United States Magistrate and was merely up for reappointment. Judge Neill told me that my appointment to the full-time position would have to be approved by a select committee of the local Bar Association. He in no way or manner ever indicated to me that I would not be appointed to the full-time position until May 7, 1979, when I received the letter attached as Exhibit 3 to Defendant's Motion for Summary Judgment. Judge

Neill's representations to me, in fact, led me to believe that he would nominate me and that after obtaining a routine Bar Committee approval I would be the full-time United States Magistrate. It seemed to me at the time that my long years of service without adequate compensation to the detriment of my law practice were finally going to be adequately rewarded.

9. All throughout my office as United States Commissioner and part-time United States Magistrate I continued to serve despite the inadequate compensation and lack of benefits on the assurances of the various judges that the benefits would improve with the position, and in my later years as part-time United States Magistrate I continued to serve on the belief, supported by those judges under whom I served, that I would be appointed to the full-time position.

10. At no time was the conversion of the part-time United States Magistrate position to a full-time position by the Judicial Conference of the United States made public in the Eastern District of Washington. At no time were any applicants solicited for this position other than the appointee, Smithmoore P. Myers. At no time was a nominating committee or select Bar Committee to my knowledge ever created to select an individual for the position of full-time United States Magistrate for the Eastern District of Washington.

11. The performance of my duties and responsibilities as commissioner and magistrate during many years of service was never the object of criticism by Judge Neill, nor had any of his judicial predecessors made any criticism of my work. In fact, the converse is true, as

I was constantly told I was doing a good job as magistrate and that my services were much appreciated by the respective judges. I was never informed of any acts indicating incompetency, misconduct, neglect of duty, or physical or mental disability, nor have I ever been accorded an opportunity for a hearing relative to any reasons to justify the termination of my office or the failure to appoint me full-time United States Magistrate.

12. My interpretation of the wording appended to my four-year appointment, on January 31, 1979 to January 31, 1983, "or at such earlier date as a full-time magistrate in Spokane may be appointed," was that it was a manner of releasing me from my four-year term as part-time United States Magistrate prior to moving me into the eight-year term as full-time United States Magistrate. It appeared to me to

be an academic method of converting the part-time position to a full-time position, as was my conversion of the part-time United States Commissioner's position to a part-time United States Magistrate position. On the 31st day of March, 1971, Judge Charles Powell of the Federal District Court appointed me to the first part-time position of United States Magistrate for the Eastern District of Washington, and the remainder of my term as United States Commissioner was dissolved into my new four-year term as magistrate.

13. My letter to Judge Marshall Neill of May 9, 1979, was not a resignation unconditionally made and without intimidating circumstances and duress. My letter of May 9, 1979, was drafted approximately 24 hours after the receipt of Judge Neill's letter of May 7, 1979.

At the time, it appeared to be the only available opportunity that would permit me to vent my absolute disappointment, my frustrations and my emotions resulting from my summary removal from a position of honor without cause and without any hearing. My letter to Judge Neill was also the only apparent means at my immediate disposal in which I could mitigate and negate the innuendos and inferences of misconduct generated by my summary removal since the public disclosure of my removal was imminent along with a selection of Smithmoore Myers as the new full-time United States Magistrate for the Eastern District of Washington. My letter to Judge Neill was written because I felt humiliation and dishonor at not being able to retain my position which I sincerely believed I had served with dignity for 22 years. After receipt of

consecutive appointments over 22 years the manner in which I was publicly discarded without cause and without a hearing was an unwarranted infliction of dishonor upon me in my profession and one of the most humiliating experiences of my life. It was generally believed in Spokane, the seat of the Eastern District of Washington, that I was fired from my position as part-time United States Magistrate because of incompetency or neglect of duties. In fact, I so strongly felt that what Judge Neill's decision brought about was so contrary to the Magistrate's Act and the procedures for selection of a full-time magistrate that I thought a cite to those pertinent procedures and a request that he reconsider his position would possibly convince the Judge to change his mind and appoint me to the full-time position as he had led

me to believe he would do during earlier conversations with him. I never received any response from my letter of May 9, 1979, to Judge Neill. At the time I wrote the letter of May 9, 1979, I was ready and willing to continue in the position of part-time United States Magistrate and ready and willing to accept the full-time United States Magistrate's position had it been offered to me.

14. I know of no reason why Judge Neill decided not to appoint me to the full-time position of magistrate, despite the previous representations leading me to believe I would be so appointed, other than the fact that in the late winter and early spring of 1979, Judge Neill was severely ill. I believe Judge Neill underwent major surgery in April of 1979 and in fact was incapacitated to the point that he was unable to attend his

office or court to perform his judicial functions.

15. During my years of service as part-time United States Magistrate I became familiar with the Magistrate's Act, as well as the procedures adopted by the Judicial Conference for the Selection of Magistrates. I relied upon the Act and the procedures, and they reinforced my belief that I would be eventually appointed to full-time United States Magistrate for the Eastern District of Washington.

/s/
Victor J. Felice

SUBSCRIBED and SWORN to before me this 27th day of August, 1981.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at Spokane

SALARY SCHEDULE

UNITED STATES COMMISSIONER:

YEAR	INCOME
1956	$ 183.75
1957	452.75
1958	654.00
1959	1,002.00
1960	1,186.00
1961	1,502.00
1962	900.00
1963	868.00
1964	700.00
1965	1,110.00
1966	846.00
1967	1,132.60
1968	1,246.00
1969	898.00
1970	1,522.00

UNITED STATES MAGISTRATE:

YEAR	INCOME
1971	$ 4,000.00
1972	5,042.00
1973	5,172.30
1974	5,555.91
1975	7,403.30
1976	16,001.66
1977	18,913.58
1978	21,600.00
1979	9,540.00

EXHIBIT 1

J19

United States District Court
Eastern District of Washington
P. O. Box 1432
Spokane, Washington 99210

Chambers of
Charles L. Powell
United States District Judge

March 31, 1971

Mr. Victor J. Felice
764 Lincoln Building
Spokane, Washington

Dear Mr. Felice:

The enclosed certificate is to evidence your appointment as Federal Magistrate. I am grateful to you for accepting the appointment. Your help and cooperation in the work of this district is sincerely appreciated by the entire Court staff as well.

Sincerely yours,

/s/ Charles L. Powell
United States District Judge

Enc.

EXHIBIT 2

J20

United States District Court
Eastern District of Washington
P. O. Box 1432
Spokane, Washington 99210

Chambers of
Marshall A. Neill
United States District Judge

April 23, 1974

Mr. Victor J. Felice
Attorney at Law
763 Lincoln Building [sic]
Spokane, Washington

Dear Vic:

I am very much aware of the inadequate compensation that you are receiving for the very fine work you are doing as Magistrate. I am not sure what it takes to move Washington, but Judges Powell, Goodwin and myself are putting together a proposed new Magistrate's Plan for the District by which we are proposing that you receive one-half the salary of a full-time Magistrate. When I return to Spokane, which will be about May 20th, I

EXHIBIT 3

will see that you get a copy of the proposal as you should have some input into the suggestions.

Please be assured of two things, first, that I appreciate very much the fine job that you are doing and, second, I realize that the compensation must be materially increased, so please bear with us for a bit.

Best regards.

Respectfully yours,

/s/
Marshall A. Neill

EXHIBIT 3

United States District Court
Eastern District of Washington
P. O. Box 1432
Spokane, Washington 99210

Chambers of
Marshall A. Neill
United States District Judge

June 7, 1974

Honorable Richard H. Chambers
Chief Judge, Ninth Circuit
Court of Appeals
Seventh & Mission Streets
San Francisco, California 94101

Dear Judge Chambers:

For several months the judges of this district have been working on a new Magistrates Plan for this district and have just finalized the same. General Kirk's letter of June 4 containing the Administrative Office's recommendations is now at hand. I enclose a copy of our proposed new Magisttrates [sic] Plan. You can readily see a number of variances

EXHIBIT 4

between our recommendations and those of the Administrative Office.

You will notice from our proposed Plan that we contemplate enlargement of the duties of the magistrates, including the assignment of duties contained in the present plan but which we have not assigned to the magistrates because we could not, in good conscience, ask then to increase their duties without a substantial increase in compensation.

Having just received General Kirk's letter which asks for a response to you by June 14, we have not had an opportunity to give full counter-analysis of the Administrative Office survey; however, I would point out two rather important facts:

EXHIBIT 4

(1) Although this is statutorily a one and one-half judge district, factually it is a one judge district. The Western District caseload has prevented Judge Goodwin of Tacoma from giving this district more than just a few days a year of his services.

(2) The present absence of magistrates' caseloads in the field of Social Security, prisoner petitions and pretrials is due simply to the fact that we could not put these burdens on them at their present salary.

We earnestly urge further consideration of the proposed salary level for the part-time magistrates at Spokane and

Yakima. They are both experienced, capable and valuable magistrates who cannot continue without substantial salary adjustments, must less can we ask them to take on may of their authorized duties.

In short summary, we recommend to the Conference:

1. That the part-time magistrate's position in Spokane be continued for an additional four-year term and that the annual salary be increased from $5577.00 to $15,000.00.

2. That the part-time magistrate's position in Yakima be continued for an additional four-year

EXHIBIT 4

term and that the salary be increased from $3304.00 to $15,000.00.

3. That the part-time magistrates at Kennewick, East Wenatchee, Ephrata and Walla Walla be terminated.

Respectfully yours,

/s/
Marshall A. Neill
Chief Judge, Eastern
District of Washington

enclosure

cc: Roland Kirks, Director,
Administrative Office

William B. Luck, Circuit Executive

Hon. Richard H. Chambers

bcc: Judge Powell
Judge Goodwin
Robert Linnell
J. R. Fallquist
Victor Felice
Lonnie Suko

EXHIBIT 4

United States District Court
Eastern District of Washington
950 United States Court House
P. O. Box 2136
Spokane, Washington 99210

Chambers of
Marshall A. Neill
United States District Judge

May 19, 1977

Mr. Victor J. Felice
Attorney at Law
555 Lincoln Building
Spokane, Washington

Dear Vic:

I am in receipt of a copy of the letter of May 4th from the Federal Judicial Center addressed to the United States Magistrates of this district regarding a seminar to be held in San Francisco on June 28th to July 1. I think these seminars are very helpful to the magistrates and I would hope that you will be in a position to attend.

EXHIBIT 5

With best personal regards.

Respectfully yours,

/s/
Marshall A. Neill

EXHIBIT 5



Seminar for FULL-TIME UNITED STATES MAGISTRATES

June 28-July 1, 1977
San Francisco, California

EXHIBIT 6


The Federal Judicial Center
Certificate of Training
VICTOR J. FELICIA
has successfully completed the
ADVANCED SEMINAR FOR
UNITED STATES MAGISTRATES
CENTER
JULY 1977

EXHIBIT 7

APPENDIX K

LETTER OF VICTOR J. FELICE TO JUDGE MARSHALL A. NEILL

The Honorable Marshall A. Neill
United States District Court
for the Eastern District of Washington
United States Court House
Spokane, Washington 99201

Dear Judge Neill:

I am in receipt of your letter of May 7, 1979, wherein you informed me that I would be relieved of my position as United States Magistrate, due to your selection of Mr. Smithmoore P. Myers as full-time United States Magistrate.

After twenty-two years of dedicated service as Commissioner and United States Magistrate, which service has been free of complaint or criticism from yourself or preceding judges, your decision comes as a grinding shock and complete surprise.

In your letter, you stated that your selection of Mr. Myers carried with it the unqualified endorsement of the Liason [sic] committee, Chief Judge Walter McGovern of the Western District, and the Magistrate's Division of the Administrative Office. I do not doubt that the aforementioned people would neither object to nor oppose your selection of Mr. Myers, for Mr. Myers is a competent and qualified person; however, I am sure that their endorsement was no more than a pro forma concurrence in your personal selection.

In 1975, in the course of the representation of a client, there was a courtroom confrontation between myself and the Honorable Donald Olsen, Judge of the Superior Court of Washington. In consequence thereof, you asked that I cease my criminal practice completely. Although

such practice was substantial, I immediately and unhesitatingly complied with your request, notwithstanding the financial sacrifice.

Were it the case that I had heretofore been criticized or reprimanded regarding my execution of official duties, I might be able to understand your decision; and, surely, if there were incidents deserving criticism, reprimand or correction, I would expect you, both as a man of candor and good faith, as well as an efficient administrator, to bring such matters to my attention, and thereby accomplish appropriate remedial measures. However, the fact is that in my twenty-two years of service, serving under Judge Driver, Judge Powell and yourself, neither you nor any of your predecessors have brought

any such incidents regarding my execution of the duties of my office.

I also find your decision shocking in that you failed to follow the guidelines promulgated by the Judicial Conference with regard to selection of a U.S. Magistrate. I direct your attention to Transmittal 32, Volume 1, dated Janaury [sic] 10, 1979, issued by the Administrative Office of the United States Courts:

> "In the case of a new appointment or if the present Magistrate is not selected by the District Judge for reappointment, the court should make a public announcement of the vacancy. The public notice should be published in a bar journal, newsletter, local legal publication, or in a

similar publication and should be filed and posted in the District Clerk's office. The public announcement should describe the duties of the position, the qualification standards, and the procedure for submission of applications, including the name and address of the person to whom applications should be addressed."

On several occasions over the past six months, I orally inquired of you as to what action was pending or likely to be forthcoming regarding the Magistrate position; and, at those times I informed you that I wished to continue in the position of Magistrate. Cognizant of the foregoing provision, I never considered seriously the possibility that you select another party to replace me, in that I

never thought you would blatantly disregard the foregoing guidelines. I was mistaken: clearly, you had no desire nor intention to make known to the public the availability of the position.

In the absence of a forthright, honest and candid response to my personal inquiries, and in the absence of any public notice to the contrary, I reasonably thought that I would continue in the position I had held for twenty-two years. In that regard, I must admit I heard a rumor in the fall of 1978 that you intended to appoint Mr. Myers to the position of full-time Magistrate: of course, after inquiring personally of you as to your intentions, and receiving from you no indication whatsoever which would substantiate such a rumor as to Mr. Myers, I disregarded such information. It

appears more than coincidental that the person about whom I heard information many months ago, ultimately was the designated appointee; I am sorry that you lack the candor necessary to confront me with your decision or intended selection.

In passing, further evidence of your lack of regard for the aforementioned guidelines may be noted. It is stated in the aforesaid guidelines that:

> "In the case of an initial appointment, they will not reach the age of seventy years before the expiration of the term of appointment."

As you know, Mr. Myers is approximately 65 years of age, and would exceed by three years the above-mentioned guildline [sic].

I have expressed to you my shock and surprise, and the reasons therefor, resulting from your decision. Summarily, and with no more apparent consideration than would precede the stroke of your pen on an Order of Continuance, you have dealt a blow to my professional reputation: it is this matter which bears most heavily on my mind. Certainly, your action will generate public inference that I was displaced as a result of misfeasance or malfeasance in the execution of my duties.

It is doubtful that the pejorative aura surrounding my dismissal can be dissipated by anything you might now or hereafter say in my behalf, were you inclined to do so.

Another matter secondary to your action in [sic] the obliteration of pension benefits which I have accrued over the past twenty-two years. As you may or may not be aware, the pension attaching to my service over the years would have vested in approximately three years. As with yourself and millions of other responsible persons who remain in long service with a private or governmental entity, such a pension has not been an inconsequential factor in my decision to remain in government service for twenty-two years. And, as I said before, if you or your predecessors had criticized my performance, or had I failed to comply with the mandated practices and procedures attending my position, I would not be justified in expecting a pension or any other benefit which might accompany my

twenty-two years of service: but no, [sic] inadequacies or criticisms of my performance have ever been brought to my attention.

Approximately twenty four hours have elapsed since I received your letter. During that time I have struggled with feelings of anger and sadness, embarrassment and frustration, dignity and loyalty. And, judging from the manner in which you dealt with me, I attempted to relegate the matter to a position of insignificance within my own mind, as you had apparently done in your own mind. However, upon further consideration, and tempered by the time as well as the counsel of many colleagues, I simply cannot consider the matter insignificant: at this stage of my life and career, your

decision bears heavily upon me, both professionally and personally.

Therefore, it is with the deepest regret and sadness that I hereby submit my resignation, effective immediately, as the United States Magistrate. I hope and pray that the bitterness in my heart resulting from this incident will absent itself from my mind as quickly as it was generated.

In the event you should see fit to reconsider this matter, or should Mr. Myers retract his acceptance of your offer, I remain available to discuss the matter with you, at your convenience. Similarly, I remain available to serve if

called upon, as I have dedicatedly and loyally served for twenty-two years.

Respectfully,

/s/
VICTOR J. FELICE
United States Magistrate
for the Eastern District
of Washington

APPENDIX L

IN THE UNITED STATES COURT OF CLAIMS
NO. 500-80C

VICTOR J. FELICE
Plaintiff,

vs.

THE UNITED STATES
Defendant.

AFFIDAVIT OF NICHOLAS P. SCARPELLI, JR.

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

NICHOLAS P. SCARPELLI, JR., being first duly sworn, upon oath deposes and says:

1. I am the attorney representing plaintiff in the above-captioned cause, and I make this affidavit on personal knowledge and belief.

2. In July, 1981, a law clerk employed by my firm, Andrew Torrance, telephoned the Administrative Offices of the United States Courts and spoke with William R. Burchill, Jr., Associate

General Counsel with the Administrative Office. Mr. Torrance inquired of Mr. Burchill as to the existence of administrative remedies available to aggrieved U.S. Magistrates such as plaintiff. According to Mr. Torrance, Mr. Burchill confirmed what our research had indicated, that there were no such administrative remedies, and further advised that he thought the instant case was one of first impression. Mr. Torrance requested that Mr. Burchill sign an affidavit concerning these facts. He declined to do so, considering his position with the Administrative Office, but indicated he would be pleased to sign such an affidavit if the Court requested the same.

3. I spoke with Mr. Burchill on August 27, 1981, by telephone, and confirmed the facts as set forth above in

Paragraph 2. Again he indicated he was aware of no administrative remedies applicable to plaintiff.

/s/
Nicholas P. Scarpelli, Jr.

SUBSCRIBED and SWORN to before me this 28th day of August, 1981.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at Seattle

Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-164

In the Supreme Court of the United States

OCTOBER TERM, 1982

VICTOR J. FELICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Court of Claims[1] erred in dismissing his claim for damages arising out of (1) his removal from his position as a part-time United States magistrate and (2) the failure to appoint him to a newly-created position as a full-time United States magistrate.

1. Petitioner served as a part-time United States magistrate in the Eastern District of Washington by appointment of the local United States District Judges under the rules set by the Judicial Conference of the United States, 28 U.S.C. 631 (Pet. App. A1-A2). Following his original appointment as a part-time United States commissioner in

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[1]The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, which became effective on October 1, 1982, abolished the Court of Claims and transferred its jurisdiction to the United States Court of Appeals for the Federal Circuit.

1956, petitioner served successive 4-year terms as commissioner and then as magistrate when the job title and duties were changed by law. His final reappointment was on January 24, 1979 (*ibid.*). Because the part-time position was converted to full-time status by the Judicial Conference, petitioner's final appointment expired by its terms on January 31, 1983, or upon the appointment of a full-time magistrate (*ibid.*).

Petitioner was a candidate for the full-time position, but on May 7, 1979, Chief Judge Marshall A. Neill notified him that another person had been selected (Pet. App. A3). Petitioner responded by letter dated May 9, 1979 (*id.* at A3, K1-K12), stating: "[I]t is with the deepest regret and sadness that I hereby submit my resignation, effective immediately, as the United States Magistrate" (*id.* at K11). He added that if Chief Judge Neill reconsidered, or if the selectee declined the office, petitioner would discuss the matter further and would "remain available to serve if called upon, as I have dedicatedly and loyally served for twenty-two years" (*id.* at K11-K12).

On May 15 1979, the Administrative Office of the United States Courts sent a Form 250, Notification of Personnel Action, to Chief Judge Neill, with a copy to petitioner, formalizing the resignation as of May 9. Thereafter, the position was treated as vacant (Pet. App. A4-A5). Since the vacancy created an emergency, the selectee for the full-time position was appointed to fill the remaining term of the part-time position and took office as the full-time magistrate on June 4, 1979 (*id.* at A5).

Petitioner brought suit in the United States Court of Claims, seeking damages for (1) improper removal from his part-time magistrate position and (2) the failure to appoint him to the newly-created full-time magistrate position. The court granted the government's motion for summary judgment (Pet. App A1-A8). First, the court ruled

that petitioner's May 9, 1979, letter was plainly a tender of resignation (*id.* at A5), and the court viewed petitioner's failure to correct the administrative office when it notified him that his resignation had been recorded as additional support for that interpretation (*id.* at A5-A6). Since petitioner had resigned, the court concluded, he could not "claim the emoluments of the part-time position for the brief time it continued to exist" (i.e., from May 9, 1979, the date of his resignation until June 4, 1979, when the full-time term began) (*id.* at A6). Second, the court held that sovereign immunity barred petitioner's damages claim for the failure to appoint him to the full-time position because Congress had not consented to such a suit (*id.* at A7). Relying upon *United States* v. *Testan*, 424 U.S. 392 (1976), the court noted that the Back Pay Act, 5 U.S.C. 5596, does not constitute such consent because it "did not confer entitlement to the pay of a position to which one was never appointed" (Pet. App. A6).

2. The decision of the Court of Claims is correct and does not conflict with any decision of this Court or of any court of appeals. Further review by this Court is therefore unwarranted.

a. Petitioner contends (Pet. 14-17) that the Court of Claims erred in granting summary judgment with respect to his claim for damages for the period from May 9 to June 4, 1979, because a genuine question of material fact existed as to whether his letter of May 9, 1979, was a resignation and, if so, whether it was obtained under duress. Petitioner's argument is erroneous and, in any event, this insignificant issue does not merit this Court's review. The Court of Claims correctly found the letter to be a tender of resignation (Pet. App. A5), relying upon not only the unequivocal language but also petitioner's failure to correct the subsequent administrative notice of his resignation (*id.* at A5-A6). Summary judgment was proper because petitioner's

letter may not reasonably be construed otherwise. And while petitioner claimed that he wrote the letter while in an emotionally charged state of mind (*id.* at J13-J16), he never explained why he did not attempt to correct the administrative notification of his resignation, which occurred one week later when he presumably was in a calmer mood.

Moreover, petitioner's final appointment as part-time magistrate expired by its terms upon the appointment of a full-time magistrate (Pet App. A2, B3). Accordingly, the appointment of the full-time magistrate on June 4, 1979, would have terminated petitioner's part-time position in any event. Thus, petitioner's resignation on May 9, 1979, merely advanced the termination of his part-time position by 26 days.

b. Petitioner next contends (Pet. 18-25) that the court below improperly dismissed his claim for damages for the failure to appoint him to the full-time position. Petitioner argues (*id.* at 30-33) that the Tucker Act, 28 U.S.C. 1491, provides jurisdiction for that claim, first, because the claim was based upon a contract implied in fact and, second, because it was based upon the Due Process Clause of the Fifth Amendment and various federal statutes and regulations.

While the Tucker Act does confer jurisdiction for "any claim against the United States founded * * * upon any express or implied contract with the United States," (28 U.S.C. (& Supp. IV) 1491) United States magistrates clearly serve by appointment, not by contract. 28 U.S.C. 631(a) expressly states that the "judges of each United States district court * * * shall *appoint* United States magistrates" (emphisis added), and petitioner concedes (Pet. 19) that "[a] magistrate is subject to appointment." Thus, there is no substance to petitioner's contract argument. See *Army &*

Air Force Exchange Service v. *Sheehan*, No. 80-1437, slip op. 7-10 (June 1, 1982); *United States* v. *Hopkins*, 427 U.S. 123 (1976).

There is also no merit to petitioner's argument that his claim was incorrectly dismissed because it was founded upon the Due Process Clause and various federal statutes and regulations. This Court has repeatedly "rejected the argument that 'the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages' " (*Army & Air Force Exchange Service* v. *Sheehan*, *supra*, slip op. 11, quoting *United States* v. *Testan*, 424 U.S. 392, 401 (1976); see also *United States* v. *Hopkins*, *supra*, 427 U.S. at 130). Rather, an asserted entitlement to money damages can succeed only if a provision of federal law waives sovereign immunity by expressly authorizing such relief. *Army & Air Force Exchange Service* v. *Sheehan*, *supra*, slip op. 11; *United States* v. *Testan*, *supra*, 424 U.S. at 400. Neither the Due Process Clause, which was also invoked by the plaintiffs in *Sheehan* (see slip op. 4) and *Hopkins* (see 427 U.S. at 130), nor the other provisions upon which petitioner relies can be fairly interpreted as mandating the payment of damages by the United States. Thus, they do not constitute waivers of sovereign immunity. Accordingly, petitioner's damages claim based upon those provisions was properly dismissed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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